ESTATE OF MARIANO EUSEBIO

IBIA 72-19-E Decided May 16, 1973

Appeal from Judge's decision after rehearing, ordering the moiety of the paternal grandparents to escheat to the Papago Indian Tribe for want of a lawful heir.

Reversed in part.

Indian Probate: Inheriting: Generally

> There is a presumption that a decedent left heirs or next of kin capable of inheriting. Where there is the possibility of an escheat the presumption is even stronger, and the burden shifts to those favoring escheat to prove there are not heirs as escheats are not favored by the law.

Indian Probate: Inheriting: Moiety

> A moiety is defined as a one-half interest in an estate.

IBIA 72-19-E

Indian Probate: Inheriting: Moiety

> Where there are no descendants of the paternal grandparents the paternal moiety passes to the heirs of the maternal grandparents.

APPEARANCES: Lindsay Brew, Esquire, for appellants Maria Dolores Rios and Theresa Pancho Orosco.

OPINION BY MR. SABAGH

This matter comes before the Board on appeal from the Administrative Law Judge's decision and order after rehearing, escheating the moiety of the paternal grandparents to the Papago Indian Tribe for want of a lawful heir.

Mariano Eusebio died intestate at the age of 69 years leaving land interests in Arizona. He was survived neither by spouse, children, issue, mother, father, sisters nor brothers. Hearings were held by Administrative Law Judge, Indian Probate, William J. Truswell, on June 24 and August 31, 1971, and certain descendants of the maternal grandparents were determined to be the lawful heirs of the decedent. Upon rehearing on December 8, 1971, certain half-blood descendants were also determined to be lawful heirs and entitled

to share in the moiety of the maternal grandparents. The Administrative Law Judge further determined that no heirs could be found for that moiety belonging to the paternal grandparents. Accordingly, he decreed that this moiety, one-half of the estate of the decedent, would escheat to the Papago Indian Tribe.

An appeal was filed by heirs of the maternal grandparents wherein it was contended in substance that where no heirs to one moiety could be traced, that moiety and the entire estate passed to the side having heirs and did not escheat to the Tribe.

It is elementary, to say the least, that the law frowns on nor does it favor escheat. It is presumed that a decedent left heirs or next of kin capable of inheriting property. In re Wallin's Estate, 490 P.2d. 863, 16 Ariz. App. 34 (1971).

When an individual dies intestate the law devolves the title to his estate upon those who by virtue of the law of the place where the land lies are his heirs. The right of inheritance is purely a matter of legislative discretion. The descent of real property is governed by the law in force at the time of the death of an intestate. In re Rattray's Estate, 82 P.2d. 625 (Cal. App. 1938).

Arizona Revised Statute pertaining to intestate succession § 14-202 subsec. 4, provides that:

> When a person having an estate of inheritance, real, personal or mixed, dies intestate as to the estate, and was not survived by spouse, children, issue, mother, father, brothers, or sisters,
>
> * * * then the estate shall be divided into moieties, one of which shall go to the paternal grandparents and their descendants, and the other to the maternal grandparents and their descendants, who shall take their moiety as parents of the intestate would have taken if living, and so on without end.

A moiety is defined as a one-half interest in an estate. Young v. Smithers, 205 S.W. 949, 181 Ky. 847 (1918). This variation (moiety) ultimately found acceptance in a dozen states throughout the country.

Arizona statutes make no reference to paternal or maternal kindred further removed t han grandparents nor do they provide for devolution of a moiety once the grandparents on the one side die leaving no descendants. The Arizona Court of Appeals, however, concluded that descendants of the maternal great-grandparents were entitled to share the moiety where the maternal grandparents died leaving no descendants. The court said in part:

> "* * * and so on without end" indicate that there was no intent to cut off the rights of heirs who were descendants of ancestors of the grandparents. * * *

State of Arizona v. Tullar, 462 P.2d. 409, 412, 11 Ariz. App. 112 (1969).

A.R.S. § 14-202, subsec. 4 originally appeared in the Arizona statutes as § 2116, R.S. (1901), and was taken from article 1688(4), Texas Revised Statutes (1895). The two statutes are identical. The part § 2116, R.S. (1901) pertinent to our case reads as follows:

> * * * If there be no surviving grandfather or grandmother, then the whole of such estate shall go to their descendants, and so on without end, passing in like manner to the nearest lineal ancestors and their descendants. (Emphasis supplied.)

In contrast to Tullar, supra, there were no descendants of the great-grandparents in this case.

In revising and codifying the laws of the State of Arizona the code commissioner was authorized in the interest of brevity to delete the words underscored immediately above, ch. 35 § 3, (1925) Ariz. Sess. See also, State v. Tullar, supra.

When a statute is adopted from another state, it is presumed that it is taken with the construction placed on it by the courts of the state of origin prior to its adoption. State v. Tullar, supra.

The court in England v. Ally Ong Hing, 459 P.2d 498, 105 Ariz. 65 (1969) said:

> "Although we are not bound by the construction given a statute by the courts of the state from which it was adopted, we consider such construction to be persuasive."

In construing Arizona Revised Statute § 14-202 subsec. 4 pertaining to intestate succession, the court in State v. Tullar, supra, said:

> * * * we look to A.R.S. § 1-211 which states that statutes should be construed liberally to effect their object and promote justice.* * *

The court in Hartley v. Langdon, 347 S.W. 2d. 749, 758 (C.C.A. Tex. 1961) said in part:

> * * * If there are kindred on only the one side, then there could be no object in dividing the estate because there would be none to take on the other side.* * *

The intent of the legislators to avoid escheat is illustrated by several state statutes relating to intestate succession which expressly provide that where there is no kindred on one part, that moiety is to go to the other part. Fla. Stat. 1955, § 731.23;

Ky. Rev. State. § 391.010; W. Va. Code 1955, § 4080; District of Columbia Code 1951, § 18-101.

The Court of Appeals of Kentucky in Young v. Smithers, supra, in pertinent part held that "where there is no kindred on the one side then the whole estate will pass to the kindred on the side which survives * * *."

To recapitulate, the decedent died intestate survived neither by spouse, children, issue, mother, father, sisters, nor brothers. Pursuant to Arizona statute and revised statute, the decedent's estate divides into two moieties, one going to the paternal grandparents and their descendants and the other to the maternal grandparents and their descendants. There were no paternal grandparents or descendants thereof. No mention is made in the Arizona statutes as to what happens to a moiety where there are no kindred on the one side, i.e., whether the moiety passes to heirs of the maternal grandparents or escheats to the state. However, the State frowns on escheat. The Arizona statutory provisions relating to moieties was adopted from the State of Texas statute relating thereto. It is presumed that it was adopted with the construction placed on it by the courts of the state of origin prior to adoption, see State v. Tullar, supra, or such construction is considered to be persuasive, see England v. Ally Ong Hing, supra. The Texas Court of

Appeals in Hartley v. Langdon, supra, at 758, said that, "* * * If there are kindred on only one side that there could be no object in dividing the estate because there would be none to take on the other side. * * *" This is reiterated in several state statutes. In addition, the Court of Appeals in Young v. Smither, supra, unequivocally held that "Where there is no kindred on the one side then the whole estate will pass to the kindred on the side which survives." Finally, in State v. Tullar, supra, referring to A.R.S. § 1-211 we are reminded that "statutes shall be construed liberally to effect their object and to promote justice."

From the foregoing, the conclusion is inevitable that the Legislature intended the moiety of the paternal grandparents to pass to the already determined heirs of the maternal grandparents, and we so hold.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals, by the Secretary of the Interior, 43 CFR 4.1, that part of the decision of the Administrative Law Judge escheating the paternal moiety to the Tribe for want of an heir is reversed, and it is ORDERED:

That the moiety of the paternal grandparents pass and be distributed to the named heirs of the maternal grandparents as previously determined by the Administrative Law Judge.

This decision is final for the Department.

_____
Mitchell J. Sabagh, Member

I concur:

_____
David J. McKee, Chairman